No. 87-107

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

BRENDA PATTERSON,

Petitioner,

vs.

McLEAN CREDIT UNION,

Respondent.

On Writ of Certiorari To The United States Court of Appeals for the Fourth Circuit

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REPLY BRIEF FOR PETITIONER

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STATEMENT OF THE CASE

Petitioner believes that its initial brief fairly states the evidence. Because the district court's legal ruling and the erroneous jury instruction prevented the jury from deciding the facts, petitioner's version of disputed facts must be accepted for the purpose of

deciding the legal questions presented. Petitioner will briefly respond to a few of respondent's alleged factual misstatements.

Respondent asserts that petitioner indicated that she did not want to do teller work. Brief for Respondent at 4. In fact, because Patterson had so much filing work, the teller work that she was assigned exacerbated the pressure on her. TR 2-108, 3-103. In this context, Patterson indicated that the part-time teller work, on top of her other responsibilities, was too much of a burden. TR 2-108.

Respondent states that Stevenson stared at Mrs. Patterson "from as much as forty feet away." Brief for Respondent at 6. The record shows that Stevenson's staring and close scrutiny of Patterson frequently occurred from five to ten feet away and on some occasions from much

closer. TR at 1-38, 1-90, 2-86 to 2-87.

Respondent asserts that Patterson was not qualified for the bookkeeping job because she answered only four of fifteen math questions on a pre-employment test. Respondent fails to note that this was a Wunderlic personnel test for which there was no evidence of validity or job-relatedness.[1]

Respondent asserts that petitioner "misleads the Court" by asserting that she was never able to find out about promotion opportunities and that white workers with less education and seniority were promoted over her. Brief for Respondent at 6. Patterson introduced evidence of respondent's hiring of four

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[1] The fifteen math questions were scattered among fifty questions and Patterson had only twelve minutes to complete the entire test. She was instructed not to "skip about" in answering the questions and the cover sheet stated: "[i]t is unlikely that you will finish all of [the 50 questions]." Record, Vol. VII, Defendant Ex. 21.

white workers into accounting or secretarial positions, while failing to consider Patterson for promotion to these positions. See TR at 1-92 to 1-97.

Respondent asserts that merit increases were denied to white employees at the same time that Patterson was denied an increase. Brief for Respondent at 7. However, of the two white employees who did not receive an increase, one had been on maternity leave for a substantial part of the year. TR 3-108, 3-150, 3-152. The district court refused to admit evidence of a possible violation of the Pregnancy Disability Act. TR 3-152.

Respondent correctly asserts that Patterson expressed interest in accounting and secretarial positions to Mr. Steer, the person who first interviewed her for the job, rather than

to Mr. Stevenson. Brief for Respondent at 2-3. However, it is clear that Steer was acting as an agent for McLean Credit Union at the time. The Credit Union was closely associated with McLean Trucking Company and the Trucking Company performed most of the personnel functions for the Credit Union. TR 1-14 to 1-18, 3-79 to 3-81, 3-132 to 3-133, 3-135 to 3-138, 3-140 to 3-141. Thus, applicants for employment at the Credit Union filled out Trucking Company applications and were interviewed and screened by the Trucking Company personnel office. TR 3-81, 3-133 to 3-135.

Respondent asserts that petitioner's statement about discrimination in filling secretarial positions is a "gross misstatement of the testimony" because "[t]he uncontradicted evidence was that no blacks ever applied for a secretarial position." Brief for Respondent at 7.

This is not true. As an example, Brenda Patterson, who had previously worked as a secretary, TR 1-12 to 1-14, applied for "any position" for which she was qualified. Record, Vol. VII, Defendant Ex. 10, page 1.[3]

ARGUMENT

I.

THE COURT SHOULD REJECT THE NOVEL LIMITATION PROPOSED BY THE SOLICITOR GENERAL

The Solicitor General[4] offers a

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[3] In the testimony on which respondent relies as "uncontradicted evidence", Stevenson testified that he did not know of any black applicants for secretarial positions. TR 4-12. However, Stevenson was in no position to know the race of all of the applicants, since the Trucking Company screened the applicants and referred only some of them to the Credit Union. Id.

[4] The Equal Employment Opportunity Commission, the federal agency with primary responsibility for enforcing employment discrimination laws, is not on the Solicitor General's brief and is not mentioned in the statement of interest. Compare, e.g., Brief for the United States as Amicus Curiae at 1, Watson v. Forth Worth Bank & Trust, No. 86-6139 (argued January 20, 1988).

novel limitation on section 1981's coverage. Although the Solicitor General's theory at first glance may seem more expansive than the Fourth Circuit's rule, the protection offered by the Solicitor General is largely illusory.

As it applies to discriminatory working conditions, the Solicitor General's theory has two prongs. First, the Solicitor General correctly concludes that "an employer violates Section 1981 when it intentionally assumes different contractual obligations with respect to black persons than to white persons." Brief for United States, at 11. See also id. at 17 n.8. Thus, an employer which uses two different form contracts, providing white employees with appropriate working conditions and similarly-situated black employees with menial tasks, excessive work and undue scrutiny, would be liable under section

1981. This different treatment of white and black employees is actionable under section 1981 even where the contractually-explicit discriminatory working conditions are not so egregious as to constitute a constructive discharge or to violate any state law. Amg Brief for United States at 11.

Petitioner agrees with the Solicitor General that contractually-explicit discrimination in working conditions violates section 1981. This conclusion theoretically expands upon the Fourth Circuit's ruling that only discrimination in hiring, firing and promotion is covered. However, in practical effect this prong of the Solicitor General's theory will provide little, if any, additional protection. Virtually all employers are now sophisticated enough not to write racial harassment, race-based workloads or race-based level of

scrutiny explicitly into their employment contracts.

The second prong of the Solicitor General's theory suggests an unprecedented limitation on section 1981's coverage. The Solicitor General asserts that where the employer does not write down (or state at the outset) that it intends to practice racial discrimination in the conditions of employment, such discrimination is actionable under section 1981 only if the employer has agreed (either explicitly or implicitly) to provide a non-discriminatory working environment. The Solicitor General thus invokes a breach of contract theory to define the coverage of section 1981.

Except for some collective bargaining agreements, it is unlikely that many employers will explicitly contract to provide a non-discriminatory

working environment. And the implicit duty of good faith dealing under state laws that the Solicitor General reads into employment contracts appears to be so narrow that it would cover only the most egregious conduct that would give rise to a cause of action for constructive discharge. See Brief for United States at 18-19.[5] Even under the Fourth Circuit's restrictive interpretation, section 1981 covers "firing," which presumably includes constructive discharge. Thus, this prong of the Soliciter General's theory would provide no real additional protection.

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5 Several courts have held that a constructive discharge occurs only when the working conditions are so intolerable that the employee is forced to quit. E.g., Young v. National Center for Health Services Research, 828 F.2d 235, 238 (4th Cir. 1987); Irving v. Dubuque Packing Co., 689 F.2d 170, 172 (10th Cir. 1982); Johnson v. Bunny Bread Co., 646 F.2d 1250, 1256 (8th Cir. 1981); Muller v. U.S. Steel Corp., 509 F.2d 923, 929 (10th Cir. 1975), cert. denied, 423 U.S. 825 (1975).

It is difficult to discern why the Solicitor General concludes that discriminatory treatment of black employees arising out of policy or practice should be excluded from section 1981's coverage, while such discriminatory treatment written into the contract is covered. Petitioner can only speculate that the Solicitor General adopts an extremely literal reading of section 1981's language guaranteeing black persons the "same right ... to make ... contracts." If the discriminatory treatment is in the contract, then it is obvious that the black employee has not been afforded the "same" contract. If, however, the discriminatory treatment arises in practice, then the black employee technically has been provided with the "same" contract, and the Solicitor General apparently views the discriminatory working conditions as

unrelated to this contract.

This overly literal reading of section 1981 has several problems. This theory converts section 1981 from a remedy for refusals to provide blacks with equal contractual opportunities to a remedy for breach of contract in those rare situations where the black worker is able to obtain a contract that requires non-discriminatory working conditions. Section 1981 is a federal anti-discrimination statute, designed to provide equal contractual opportunities, not a breach of contract remedy. Incorporation of state laws to determine the scope of substantive protections under section 1981 is at odds with the legislative purpose. The extensive legislative history, detailed in petitioner's initial brief, pp. 46-55, shows that one purpose of section 1981 was to pre-empt a large body of state

laws collectively known as Black Codes. There is no indication that Congress intended to incorporate the varied and inconsistent state laws to determine substantive liability under section 1981.

Liability under section 1981 should not turn on whether the employer explicitly writes down the discriminatory conditions in the employment contract. The denial of the full benefit of the contract occurs regardless of whether the discriminatory treatment is explicitly included in the contract or is simply practiced by the employer.

In addition, the desirable working conditions provided to white workers and the discriminatory working conditions provided to black workers are not separate and independent from the contract of employment. Even if working conditions are not <u>in</u> the contract, they

are related to it.[6] Subjecting black workers to discriminatory working conditions is analytically the same as the award of a year-end bonus to white but not to black employees. The bonus is not a contractual right for either the white or the black worker, but it nonetheless results from the employment pursuant to the contract.[7]

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[6] The Court's decision in Tillman v. Wheaton-Haven Recreation Ass'n, 410 U.S. 431 (1973), makes clear that a benefit that is related to the holding of property is covered by section 1982, even where there is no property right to the benefit. The black plaintiff in Tillman had purchased a home close to a private swimming club which voluntarily provided membership preferences to homeowners in the neighborhood. Nothing in the black homeowner's purchase agreement or deed gave him a right to preference for club membership. Nonetheless, the Court held that the club's discriminatory membership policy "abridged and diluted" the black homeowner's "right to acquire a home." 410 U.S. at 437.

[7] A bonus that results from employment is treated as taxable salary, and not as a gift, under federal income tax law. I.R.C. § 102(c)(1). See also Rabkin & Johnson, Federal Income, Gift and Estate Taxation § 14.08[3] (1987).

Furthermore, section 1981 prohibits racially discriminatory conduct, whether by the employer or a third person, that discourages or interferes with the right to obtain equal contractual opportunities. Obviously, an employer's discriminatory treatment of black employees will discourage such workers from applying for and accepting employment with that employer. In this case, when Brenda Patterson complained about her working conditions, she was told "that I could always leave." TR 1-48. Such discrimination in the conditions of employment is no different from a Ku Klux Klan cross burning in the front yard of a worker, as a message that the worker should not apply for, accept, or continue to hold, a particular job. The Court has made clear that conduct on

the basis of race discouraging an employee from continuing her employment violates section 1981 regardless of whether the employee actually resigns.[8]

The theory advanced by the Solicitor General is inconsistent with the Court's prior decisions. Johnson v. Railway Express Agency, Inc., 421 U.S. 454, (1975), applied section 1981 to discrimination in job assignments. There is no suggestion in that opinion that this discrimination was written into the employment contracts, and thus covered by

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[8] The Court concluded that where "a group of white men had terrorized several Negroes to prevent them from working in a sawmill ... there was no doubt that [the whites] had deprived their Negro victims, on racial grounds, of the opportunity to dispose of their labor by contract," in violation of section 1981. Jones v. Mayer Co., 392 U.S. 409, 441-42, n.78 (1968) (overruling Hodges v. United States, 203 U.S. 1 (1906)). See also Vietnamese Fishermen's Ass'n v. Knights of the Ku Klux Klan, 518 F. Supp. 993, 1008 (S.D. Texas 1981) (KKK threats and intimidation in attempt to cause termination of contract between fishermen and dock owners actionable under § 1981).

the first prong of the Solicitor's theory. Moreover, there is no suggestion that the employer in that case had contracted to make job assignments on a non-discriminatory basis, thus bringing its conduct under the second prong of the Solicitor General's theory. Similarly, Shaare Tefila Congregation v. Cobb, 481 U.S. _____, 107 S.Ct. 2019 (1987), and Tillman v. Wheaton-Haven Recreation Ass'n, 410 U.S. 431 (1973), involved neither discrimination that was written into the deed nor a non-discrimination agreement that had been breached.[9]

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[9] The Solicitor General suggests that the Court's decision in McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976), supports its theory. The Solicitor General construes McDonald as holding that "the white employees had been denied the specific contractual opportunity made available to the black employee -- continued employment notwithstanding charges of misappropriation of the employer's property." Brief for United States at 12. However, the opportunity to remain employed notwithstanding charges of misappropriation is no more "contractual"

II.

SECTION 1981 PROHIBITS RACIAL DISCRIMINATION IN THE TERMS AND CONDITIONS OF EMPLOYMENT

A. Section 1981 Is Not Limited to Protection Against Absolute Denial of "Economic Rights"

Respondent's major argument is that section 1981 "was passed to protect property and economic rights." Brief for Respondent at 21.[10] Respondent contends

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than the opportunity to remain employed under non-discriminatory working conditions. This opportunity was not a part of either the black or the white employees' contract. It was a benefit, voluntarily conferred by the employer. Nonetheless, the Court concluded that the discriminatory provision of this benefit would violate section 1981.

10 Respondent also argues that section 1981 "is addressed solely to legal capacity to contract." Id. at 25. The argument that section 1981 extends only to legal rules which deny minorities the capacity to make or enforce contracts was rejected in Runyon v. McCrary, 427 U.S. 160 (1976). Respondent quotes extensively from the concurring and dissenting opinions in that case, apparently in the hope that the Court will reconsider and overrule Runyon. See Brief for Respondent at 19-20, 25-26. Petitioner believes that Runyon and Jones v. Mayer Co., 392 U.S. 409 (1968), were

that economic rights encompass only "the right to enter into a contract and bind the other party to it." Id.

In attempting to limit section 1981 to so-called "economic rights" -- defined to exclude discrimination in the terms

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correctly decided. The various opinions in those cases thoroughly analyze whether section 1 of the 1866 Civil Rights Act provides a cause of action for private discrimination, and petitioner has nothing to add to that debate.

In any event, Jones and Runyon settled the debate and there is no reason for the Court to revisit the issues resolved in those decisions. As stated by Justice Stevens in his concurring opinion in Runyon: "Jones has been decided and is now an important part of the fabric of our law. ... For the Court now to overrule Jones would be ... so clearly contrary to ... the mores of today that I think the Court is entirely correct in adhering to Jones." 427 U.S. at 190, 191-192. Members of the Court who dissented in Jones and Runyon have in recent years indicated acceptance of those decisions. For example, last Term the Court unanimously reaffirmed that section 1981 "forbid[s] all 'racial' discrimination in the making of private as well as public contracts." Saint Francis College v. Al-Khazraji, 481 U.S. __, 107 S. Ct. 2022, 2026 (1987).

and conditions of employment--respondent ignores the extensive legislative history establishing that Congress was most concerned with discriminatory treatment of black workers who entered into contracts of employment with former slave owners. This clear expression of legislative intent alone mandates rejection of respondent's narrow interpretation of section 1981.

The authorities cited by respondent do not support its "economic rights" limitation. The "economic rights" theory is derived from language in the dissenting opinion in Goodman v. Lukens Steel Co., 482 U.S. ___, 107 S.Ct. 2617, 2628 (1987) (Brennan, J., joined by Marshall & Blackmun, JJ.). See Brief for Respondent at 23. Yet, the Court in Goodman rejected the notion that section 1981 protects only economic rights. The Court held that the guarantee to make and

enforce contracts "is ... part of the federal law barring racial discrimination, which ... is a fundamental injury to the individual rights of the person." 107 S.Ct. at 2621. Moreover, the dissenting opinion on which respondent relies concluded that section 1981 prohibits employers from "provid[ing] [to minorities] a lesser opportunity [to contract] than others, in the form of less favorable contract terms or unequal treatment discouraging entry into contractual relations." 107 S.Ct. at 2627 n.4.

Respondent appears to concede that the Court's prior decisions do not support the result that it advocates, asserting that those decisions "have added to the difficulty" in discerning the scope of section 1981. Brief for Respondent at 28. As set out in detail in petitioner's initial brief, the

Court's prior decisions make clear that racial discrimination in the terms and conditions of employment is prohibited by section 1981.[11]

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[11] Respondent attempts to limit Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975), by asserting that the coverage of seniority and job assignments in that case "is not inconsistent with the idea that § 1981 was passed to protect property and economic rights and does not address interpersonal relationships." Brief for Respondent at 21. The alleged discrimination in the Johnson case is no different from the discrimination against petitioner in the instant case. In Johnson, the plaintiff alleged that the employer "assigns, reassigns, promotes, and otherwise acts or fails to act" in a discriminatory manner. Appendix at 6a (Complaint ¶ V(2)), Johnson v. Railway Express. The EEOC Final Investigative Report, attached to the Complaint in Johnson, described a variety of allegations, including racial harassment of Willie Johnson, "more severe" work orders and discipline for black employees and "dual standards, based on race, for conditions of employment and disciplinary action." Id. at 22a, 36a. The Brief for Petitioner in Johnson opened with the statement: "Petitioner, Willie Johnson, Jr., is a black man who claims to have been subjected by respondents to racial discrimination in the terms and conditions of employment." Brief for Petitioner at 2 (emphasis added). In this context, the Court in Johnson

The lower court cases cited by respondent also do not support its "economic rights" theory. Respondent cites only two lower court cases that are on point. Williams v. Atchison, Topeka & Santa Fe Ry., 627 F. Supp. 752 (W.D. Mo. 1986); Minority Police Officers Association v. City of South Bend, 617 F. Supp. 1330 (N.D. Ind. 1985), aff'd, 801 F.2d 964 (7th Cir. 1986). These two

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specifically held "that § 1981 affords a federal remedy against discrimination in private employment on the basis of race." 421 U.S. at 459-460.

In both Johnson and the instant case, the claim involves the treatment of the employee "after the contract is in effect" and is inconsistent with respondent's position that section 1981 prohibits only conduct that absolutely prevents entry into the contract. See Brief for Respondent at 22. In addition, a major part of petitioner's claim in this case involves her job assignments, such as dusting and sweeping the office and excessive work. It is difficult to understand why the job assignment issue in Johnson is deemed to affect economic rights, while petitioner's job assignment claim is labelled as affecting only "interpersonal relationships."

district court decisions both conclude in a footnote that section 1981 does not cover discrimination in the terms and conditions of employment. However, neither of these decisions includes any analysis of the issue or cites any authority to support the conclusion. The decisions make no mention of an "economic rights" theory. Each of these district court footnotes contravenes the governing law of the circuit that section 1981 encompasses discrimination in the terms and conditions of employment. See Ramsey v. American Air Filter Co., 772 F.2d 1303, 1312 (7th Cir. 1985); Wilmington v. J. I. Case Co., 793 F.2d 909, 916 (8th Cir. 1986); Block v. R. H. Macy & Co., 712 F.2d 1241, 1247 (8th Cir. 1983).[12]

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12 Respondent also cites Howard v. Lockheed-Georgia Co., 372 F. Supp. 854 (N.D. Ga. 1974), as holding "that separate claims for racial harassment are not cognizable under § 1981." Brief for Respondent at 15. In fact, Howard did not address the scope of section 1981's

Respondent relies on four other cases to support its assertion that section 1981 protects only economic rights. See Brief for Respondent at 24-25 and n.17. None of these cases even hints that the scope of section 1981 is limited to so-called economic interests. To the contrary, in one of the cases the Fifth Circuit decided the merits of a section 1981 claim for racial discrimination in working conditions, thus implying that this cause of action is cognizable.[13]

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coverage, but held that section 1981 does not authorize the award of compensatory damages. See 372 F. Supp. at 855-58. This conclusion was rejected in Johnson v. Railway Express, 421 U.S. at 459-60.

13 Adams v. MacDougal, 695 F.2d 104, 105-107 (5th Cir. 1983). The other three cases cited by respondent are not on point. See Howard v. Security Service, Inc., 516 F. Supp. 508, 513 (D. Md. 1981); Faraca v. Clements, 506 F.2d 956 (5th Cir.), cert. denied, 422 U.S. 1006 (1975); Macklin v. Spector Freight Systems, 478 F.2d 979 (D.C. Cir. 1973). As is true of dozens of other cases, in Howard, Faraca and Macklin, the claimed

Respondent also cites several constructive discharge cases, asserting that such cases "are helpful because they demonstrate that racial harassment is an element necessary in such cases rather than a separate claim for relief." Brief for Respondent at 30-31.[14] In fact, two of these cases support petitioner's position. In Martin v. Citibank, 762

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violation was the defendant's refusal to enter into a contract. The fact that cases exist upholding section 1981's coverage of such conduct does not mean that this is the only type of conduct that violates section 1981. In fact, the Court in Faraca recognized that "interference" with the right to contract violates section 1981. 506 F.2d at 958.

[14] Respondent asserts that "the Petitioner's claims alleging constructive discharge were dismissed by the trial judge upon Respondent's motion for summary judgment." Brief for Respondent at 32. This is incorrect. Petitioner, who was laid off, did not assert a constructive discharge claim. See Joint Appendix at 5-16 (Complaint). The district court's ruling denying the defendant's motion for summary judgment did not mention any constructive discharge claim. Record, Vol. I, Tab 13 (Memorandum and Order, filed March 14, 1985).

F.2d 212, 214-215 (2d Cir. 1985), the court entertained on the merits a section 1981 claim of discriminatory working conditions based on the administration of a polygraph test to minority employees. 762 F.2d at 216-220.[15] And in Long v. Ford Motor Co., 496 F.2d 500, 505 (6th Cir. 1974), the Court concluded: "When an employer ... places more stringent requirements on employees because of their race, section 1981 is violated."[16]

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[15] The working conditions claim was joined with a separate claim of constructive discharge. The court ruled on the merits that the plaintiff had presented insufficient evidence to support the jury verdict of discrimination in working conditions. 762 F.2d at 220.

[16] The three other constructive discharge cases cited by respondent do not address section 1981's coverage of discriminatory working conditions. The plaintiff in Irving v. Dubuque Packing Co., 689 F.2d 170, 171-172 (10th Cir. 1982), framed his allegations as constructive discharge and did not assert a separate claim related to the conditions of employment. In Johnson v. Bunny Bread Co., 646 F.2d 1250 (8th Cir. 1981), the plaintiff joined claims under

Respondent also argues that "[generally], ... the cases have not supported an independent claim for racial harassment or hostile work environment under section 1981 separate and apart from claims under Title VII or collateral claims of racially discriminatory promotion and discharge practices under section 1981." Brief for Respondent at 29. To support this argument, respondent offers novel theories to distinguish the numerous court of appeals decisions[17] that have upheld a section 1981 cause of action for discriminatory terms and

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both section 1981 and Title VII of discrimination in working conditions and discharge. The court ruled against plaintiff on the merits of all claims without addressing whether the working conditions claim was actionable under section 1981. See 646 F.2d at 1252 n.1. Muller v. U. S. Steel Corp., 509 F.2d 923 (10th Cir.), cert. denied, 423 U.S. 825 (1975), held only that discriminatory failure to promote does not alone constitute constructive discharge.

17 See cases cited in Brief for Petitioner at 35 n.12.

conditions of employment. Brief for Respondent at 30. As set out in the Reply Memorandum for the Petitioner, at 1-16, filed in support of the petition for writ of certiorari, respondent's effort to distinguish these court of appeals decisions fails.

Underlying respondent's argument is the assumption that discrimination in the terms and conditions of employment does not affect the employee's economic interests.[18] This assumption is incorrect. The humiliation and

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18 Respondent's "economic rights" theory ignores the fact that petitioner's claim of salary discrimination was dismissed on the ground that it was not within the scope of section 1981. It is difficult to imagine a claim more related to economic interests than salary discrimination.

degradation suffered by an employee who, because of her race, is assigned menial tasks, is given an oppressive workload, is told that "blacks are slower by nature than whites," and is subjected to undue and unequal scrutiny, clearly discourages the making and enforcing of an employment contract. The economic choice available to an employee who is offered employment under such discriminatory conditions is different from that available to a worker who is offered non-discriminatory terms and conditions. For example, a black employee who has the opportunity to choose between taking or continuing in a job that pays ten dollars per hour with discriminatory, humiliating conditions, or another job at five dollars per hour with non-discriminatory conditions, may well choose the lower paying job in order to avoid the harm inherent in the racially-biased environment. Clearly,

whatever choice she makes, that worker's economic interest has been adversely affected, because she does not have the same economic opportunity as a white worker.

B. Petitioner Presented a Prima Facie Case of Discrimination in the Terms and Conditions of Employment

Respondent argues that petitioner failed to present evidence sufficient to support a claim of racial harassment. This argument was not raised in respondent's brief in the court of appeals or in respondent's brief in opposition to the petition for certiorari, and is not included in the Questions Presented on which the Court granted review. The Court should decline to exercise its discretion to consider this fact-based argument. See Oklahoma City v. Tuttle, 471 U.S. 808, 815-816 (1985).

On the merits, there can be no doubt

that the evidence introduced by petitioner is sufficient to support a claim of discrimination in the terms and conditions of employment. Petitioner introduced evidence of a pattern throughout her employment of an unequal and oppressive workload and of unequal and demeaning scrutiny. In addition, plaintiff presented evidence that she was denied a salary increase that was given to other employees and that respondent gave a false explanation for the denial of this increase to plaintiff.

Contrary to respondent's assertion, the discrimination in the terms and conditions of petitioner's employment did not occur outside the three-year statute of limitations period. At trial, the district court carefully divided the presentation of plaintiff's case into incidents that occurred after January, 1981, and those that occurred before.

Thus, petitioner presented evidence that after January, 1981, she was the only clerical employee required to dust and sweep the office, TR 1-30, 1-31,[19] that her workload was oppressive and much in excess of that given to white clerical workers, TR 1-27 to 1-29, that other employees performed the tasks of white workers while they were on vacation, but when Patterson went on vacation her work just "piled up," TR 1-37, that Stevenson stared at her four to five times a week and made comments about Patterson being "still behind," TR 1-39, 1-38, that this staring and these remarks were not made to white workers, *id.*, that Stevenson criticized Patterson publicly by name in staff meetings while addressing white workers' errors in private counselling sessions, TR 1-39 to 1-40, and that in

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19 Respondent did not deny petitioner's evidence about dusting and sweeping the office.

1982 Stevenson remarked that a black job applicant "could just forget it," TR 1-44 to 1-45. Only after Patterson introduced this evidence of events occurring within the limitations period was she allowed to go back in time and show that these incidents were part of a pattern that started with her pre-employment interview and continued throughout her employment. TR 1-80.[20]

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20 Respondent asserts that the pre-1981 discrimination is not actionable. However, where a pattern of discriminatory conduct by the employer continues into the limitations period, the court may reach back and provide a remedy for conduct that is part of the pattern. E.g. Havens Realty Corp. v. Coleman, 455 U.S. 363, 380-381 (1982) (applying continuing violation doctrine to 180-day filing requirement under Fair Housing Act); Taylor v. Home Insurance Co., 777 F.2d 849, 856 (4th Cir. 1985), cert. denied, 106 S. Ct. 3249 (1986); McKenzie v. Sawyer, 684 F.2d 62, 72 (D.C. Cir. 1982); Jewett v. International Tel. & Tel. Corp., 653 F.2d 89, 91-92 (3rd Cir.), cert. denied, 454 U.S. 969 (1981); Roberts v. North American Rockwell Corp., 650 F.2d 823, 826-828 (6th Cir. 1981); Satz v. ITT Financial Corp., 619 F.2d 738, 743-744 (8th Cir. 1980); Reed v. Lockheed Aircraft Corp., 613 F.2d 757, 759-760 (9th Cir. 1980); Acha v. Beame, 570 F.2d 57, 65 (2d Cir. 1977). Clearly, the discrimination against Mrs. Patterson in the terms and conditions of her employment, which was a continuing and almost daily pattern, falls within the continuing violation doctrine. The continuing violation doctrine applies to claims under § 1981 as well as Title VII. E.g. Perez v. Laredo Junior College, 706 F.2d 731, 733 (5th Cir. 1983); Chung v. Pomona Valley Community Hospital, 667 F.2d 788, 791 (9th Cir. 1982); Macklin, 478 F.2d at 994 n.30. But see Kopperud v. Burlington Industries, Inc., 803 F.2d 787 (4th Cir. 1986).

Patterson also introduced evidence of several racial remarks made by respondent's President. These remarks are not the type of aperadic comments in "casual convereation" that may not alone be actionable under section 1981 or Title VII. Rather than being isolated, Mr. Stevenson's remarks are directly related to and explanatory of respondent's harsh conduct toward petitioner. Because Stevenson believed that "blacks are ... slower than whites by nature," he persisted in piling work on petitioner

and then criticising her for being "slow." The fact that Stevenson did not make the racial remark every day does not reduce the harm to petitioner, since Stevenson by his actions toward Brenda Patterson reiterated his racial beliefs day after day, year after year.[21]

Patterson also introduced evidence that she suffered substantial injury as a result of respondent's discriminatory conduct:

> I was humiliated, I was nervous all the time, I worried, I lost sleep, I'm dreaming about working during the night and completing jobs, I was -- I brought my troubles and my worries home, and I cried constantly, and I was just nervous and I felt downgraded, and I felt like I was just being used by the credit union, and being harassed and humiliated.

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[21] Stevenson also told Patterson that "[a]ll the other white girls can do your jobs faster than you can" and, "after ... he quit saying the blacks and the whites ... he mentioned animals were faster -- that some animals was faster than other animals...." TR 2-83.

TR 1-40.

Respondent also argues that it satisfied its burden of articulating a non-discriminatory explanation for its treatment of petitioner and that petitioner failed to introduce additional evidence of pretext.[22] The law is clear that the plaintiff is not required to introduce additional evidence of pretext, but may rely on her case-in-chief and cross-examination of the defendant's witnesses to establish pretext.[23] In this case, the parties introduced conflicting evidence concerning petitioner's workload and respondent's

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[22] Respondent does not make this argument with respect to petitioner's salary discrimination claim. Respondent also introduced no explanation for assigning petitioner, but not the other clerical workers, to dust and sweep the office.

[23] Coates v. Johnson & Johnson, 756 F.2d 524, 531 n.5 (7th Cir. 1985); Worthy v. United States, 616 F.2d 698, 701 (3rd Cir. 1980).

scrutiny of her, and resolution of the conflict would depend largely on the credibility of individual witnesses. For example, if the jury believed the evidence concerning Stevenson's racial remarks and attitudes, it could reasonably have concluded that this racial prejudice, rather than legitimate employer concerns, caused his workload decisions and his criticism and scrutiny of Brenda Patterson.

III.

THE "SUPERIOR QUALIFICATIONS" JURY INSTRUCTION IMPROPERLY DENIED PETITIONER A FULL OPPORTUNITY TO PROVE DISCRIMINATORY INTENT

Respondent apparently does not disagree with petitioner's legal analysis of the many ways to prove discriminatory intent. Instead, respondent argues the facts, asserting that petitioner did not present any of the types of evidence that are probative on the issue of intent. Respondent asks the Court to find that

"under the facts of this case, the jury instruction was correct." Brief for Respondent at 41.

Neither the district court nor the court of appeals suggested that the validity of the "superior qualifications" jury instruction was limited by the facts of this case. And, in view of the evidence presented by petitioner, respondent's suggestion is clearly without merit.

The extensive evidence of the racial prejudice of respondent's President and key decisionmaker, Robert Stevenson, is set out in petitioner's brief and will only be summarized here. The company Vice-President, while testifying as a witness for the defendant, admitted that Stevenson "didn't want to hire any blacks," TR 4-89. A supervisor testified about a 1980 incident in which Stevenson refused to hire a black applicant because

"[w]e don't need any more problems around here." TR 2-161. Mrs. Patterson testified about another incident in which Stevennon refused to take the application of a black worker. TR 1-43 to 1-45. Mrs. Patterson also testified that Stevenson expressed the view that "blacks are known to work slower than whites by nature." TR 1-88. Stevenson told Patterson when she first came to work that the "white women ... probably wouldn't like me because they weren't used to working with blacks." TR 1-19.[24]

Respondent contends that this evidence is insufficient to permit a jury to infer that the company's asserted

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[24] Petitioner also established that Stevenson hired no black employee from 1953 to 1972, that the company never had a black supervisor, secretary (the secretaries worked personally for the upper managers) or accounting employee and that the company had only three black employees during Stevenson's thirty-two years tenure. TR 1-29, 3-124, 3-129, 4-12.

reliance on qualifications is pretextual. Apparently, respondent believes that the only sufficient proof of pretext is an admission by the employer that its racial attitudes and policies infected this decision. To the contrary, petitioner's direct evidence, if believed, would shift the burden of proof to the employer. Trans World Airlines v. Thurston, 469 U.S. 111 (1985).

Clearly, a jury that believed plaintiff's evidence[25] could reasonably find that Patterson was not given fair consideration for the promotion because of her race. In fact, on this evidence, if true, it is almost inconceivable that a black employee could have been given non-discriminatory consideration.

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[25] Since Stevenson denied most of this evidence, a jury that believed plaintiff's evidence might well refuse to find Stevenson credible in any of his testimony. Respondent's defense depended largely on Stevenson's credibility.

Respondent also argues that petitioner did not establish a prima facie case, alleging that Patterson was not qualified for the promotion and that no vacancy existed. The district court ruled that the evidence was sufficient to require submission of these questions to the jury. The Court should exercise its discretion to decline to address these factual questions.

If the Court reaches the merits of the prima facie case argument, respondent's allegations must be considered in the context of the company's operating procedures and the evidence about the qualifications of the selectee. Respondent had no formal procedures for making promotions, for upgrading a particular position or for distinguishing between the two. TR 3-131. Respondent had no statement or description of the qualifications for the

job of accounting clerk intermediate, which was a bookkeeping position.

Petitioner Patterson had a college degree and more seniority with the company, while Williamson had taken college courses in accounting, but did not obtain a degree. Patterson had performed some bookkeeping functions with her prior employer. TR 1-21 to 1-22. Respondent admitted that Williamson had to be trained in the bookkeeping functions that she performed. TR 3-187 to 3-188. Patterson testified that Williamson was given new tasks and new training for the new job of accounting clerk intermediate. TR 1-49, 2-56 to 2-57. Although respondent allegedly gave Williamson the promotion to reward her outstanding past performance, one supervisor testified that Williamson's performance was unsatisfactory and that she did not understand accounting

functions. TR 2-159, 2-185 to 2-190.[26] In this situation and given petitioner's direct evidence, it is the jury's province to decide whether racial discrimination biased that decisionmaking process.

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26 Respondent incorrectly asserts that this supervisor said only that Williamson did not understand data processing. Respondent also asserts that this supervisor's testimony "is irrelevant or severely limited" because he was terminated for poor job performance. Brief for Respondent at 3 n.3. In fact, the record strongly supports the inference that this supervisor was terminated for opposing racial discrimination practiced by respondent. See TR 2-164 to 2-169.

CONCLUSION

For the reasons stated, the Court should reverse the decision of the Court of Appeals and remand the case for a new trial.

Respectfully submitted,

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